(6)

No. 93-141

In the Supreme Court of the United States

October Term, 1993

WEST LYNN CREAMERY, INC. AND
LECOMTE'S DAIRY, INC.,
Petitioners,
v.
JONATHAN HEALY, COMMISSIONER OF MASSACHUSETTS
DEPARTMENT OF FOOD AND AGRICULTURE,
Respondent.

ON WRIT OF CERTIORARI TO THE
MASSACHUSETTS SUPREME JUDICIAL COURT.

PETITIONERS' BRIEF ON THE MERITS

PETITION FOR CERTIORARI FILED
JULY 14, 1993.

CERTIORARI GRANTED OCTOBER 4, 1993.

MICHAEL L. ALTMAN
Counsel of Record
MARGARET A. ROBBINS
RUBIN AND RUDMAN
50 Rowes Wharf
Boston, Massachusetts 02110
(617) 330-7000

Counsel for Petitioners

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED FOR REVIEW

1. Does a state law requiring milk dealers to pay a minimum price on all fluid milk sold within the state, including milk produced out-of-state, which raises funds to pay local dairy farmers the increased minimum price by imposing an assessment on the sale of all milk, including milk produced outside the state, violate the Commerce Clause of the United States Constitution within the meaning of this Court's decision in *Baldwin* v. *G.A.F. Seelig*, 294 U.S. 511 (1935)?

2. Does the burden imposed on interstate commerce by a state law which requires milk dealers to pay a minimum price on all milk sold within the state, including milk produced out-of-state, which raises funds to pay local dairy farmers the increased minimum price by imposing an assessment on the sale of all milk, including milk produced outside the state, outweigh the law's benefit of protecting local dairy farmers, within the meaning of this Court's decision in *Pike* v. *Bruce Church Inc.*, 397 U.S. 137 (1970)?

LIST OF PARTIES

The petitioners are West Lynn Creamery, Inc. ("West Lynn") and LeComte's Dairy, Inc. ("LeComte's").[1] The respondent is Jonathan Healy, the present Commissioner of the Massachusetts Department of Food and Agriculture, who is substituted for Gregory Watson, the former Commissioner of the Massachusetts Department of Food and Agriculture, pursuant to Supreme Court Rule 35.3.

[1] Pursuant to Supreme Court Rule 29.1, the petitioner West Lynn Creamery, Inc. states that it is a privately held corporation with no subsidiaries. West Lynn Creamery, Inc. is wholly-owned by Scangas Brothers Holdings, Inc. Scangas Brothers Holdings, Inc. also wholly-owns Richdale Stores, Inc. and West Lynn Creamery Realty Corp.

The petitioner LeComte's Dairy, Inc. is a privately held corporation with no parent companies, subsidiaries, or affiliated corporations.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES.

STATUTES AND RULES

REGULATIONS

UNITED STATES CONSTITUTION

MISCELLANEOUS

No. 93-141

In the Supreme Court of the United States

October Term, 1993

WEST LYNN CREAMERY, INC. AND
LECOMTE'S DAIRY, INC.,
Petitioners,
v.
JONATHAN HEALY, COMMISSIONER OF MASSACHUSETTS
DEPARTMENT OF FOOD AND AGRICULTURE,
Respondent.

ON WRIT OF CERTIORARI TO THE
MASSACHUSETTS SUPREME JUDICIAL COURT.

PETITIONERS' BRIEF ON THE MERITS

OPINIONS BELOW

The Opinion of the Massachusetts Supreme Judicial Court is reported at 415 Mass. 8, 611 N.E.2d 239 (1993) and is reprinted in the Joint Appendix at JA118.[2] The Order of the Massachusetts Supreme Judicial Court staying the issuance of its rescript pending this Court's determination of the constitutionality of a pricing order is unreported and is reprinted at

[2] Citations to material printed in the Joint Appendix appear as "JA___."

JA131. The Order of the Massachusetts Appeals Court enjoining the Commissioner from revoking the Petitioners' milk dealers' licenses is unreported and is reprinted at JA113. The opinion of the Massachusetts Superior Court denying the Petitioners' Second Motion for a Preliminary Injunction is unreported and is reprinted at JA108. The Decision of the Commissioner of the Massachusetts Department of Food and Agriculture revoking West Lynn's milk dealer's license for failure to comply with a pricing order is unreported and is reprinted at JA84. The Decision of the Commissioner of the Massachusetts Department of Food and Agriculture revoking LeComte's milk dealer's license for failure to comply with a pricing order is unreported and is reprinted at JA91.

JURISDICTION

The Opinion of the Massachusetts Supreme Judicial Court, the highest state court in Massachusetts, was entered on April 15, 1993. (JA9,118). The Massachusetts Supreme Judicial Court held that a milk pricing order, issued by the Commissioner of the Massachusetts Department of Food and Agriculture, did not violate the Commerce Clause of the United States Constitution. (JA118). No petition for rehearing was sought. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a). The Petition for a Writ of Certiorari was filed on July 14, 1993, and granted on October 4, 1993.

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

Article 1, Section 8 of the Constitution of the United States provides in pertinent part as follows:

> The Congress shall have the Power . . . To Regulate Commerce with foreign Nations, and among the several States. . . .

The Amended Pricing Order issued by the Commissioner of the Massachusetts Department of Food and Agriculture is reprinted at JA32.

STATEMENT OF THE CASE

The Petitioners, West Lynn and LeComte's, are Massachusetts licensed milk dealers[1] who sell milk and related dairy products on the wholesale level in New England. (JA45). Approximately ninety-seven percent of West Lynn's and LeComte's milk is purchased from dairy farmers in New York and Maine; less than three percent of their milk is purchased from Massachusetts dairy farmers. (JA49). West Lynn and LeComte's purchase their milk from out-of-state dairy farmers who compete with Massachusetts dairy farmers. (JA66). West Lynn and LeComte's compete with other milk dealers, some of whom purchase a substantially larger percentage of their milk from Massachusetts dairy farmers. (JA59).

I. Federal Regulation of the Milk Industry

Milk that is produced by dairy farmers in one state is often sold to milk dealers in another. (JA46-47). To reduce the risk that interstate rivalries may jeopardize the free flow of a fresh supply of milk, the federal government regulates the marketing

[1] Milk dealers are also referred to as milk wholesalers or milk processors.

of dairy products throughout most of the United States. (JA46). In 1937, responding to intense competition between dairy farmers in various states, the Agricultural Marketing Agreement Act (the "Act") 7 U.S.C. §§ 601 *et seq.*, was passed. The Act authorizes the Secretary of Agriculture (the "Secretary") to issue milk marketing orders setting minimum prices that milk dealers, such as the Petitioners, must pay to dairy farmers for their milk. *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 341-342 (1984) *citing* 7 U.S.C. § 608c. The essential purpose of the Act is to raise producer prices to ensure that the benefits and burdens of the milk market are fairly and proportionately shared by all dairy farmers in each state in each region of the country. *Block* v. *Community Nutrition Institute*, 467 U.S. at 342 *citing* S. Rep. No. 1011, 74th Cong. 1st Sess. 3 (1935) and *Nebbia* v. *New York*, 291 U.S. 502, 517-518 (1934).

Typically, marketing areas covered by the federal marketing orders encompass several states. Each area is designed to include milk distributors who compete with each other in a particular milk market. *See* Agricultural Marketing Service, U.S. Department of Agriculture, *The Federal Milk Marketing Order Program*, Marketing Bulletin No. 27 at 19 (1990). For many years, the Secretary has issued and enforced one milk marketing order for virtually all of New England — New England Federal Milk Marketing Order No. 1 ("Order No. 1"). (JA46). The Order No. 1 marketing area includes most of Massachusetts, all of Rhode Island and Connecticut, and portions of Vermont and New Hampshire. (JA46).

The Act's minimum price regulation across state lines reflects the interstate nature of commerce in the milk industry. (JA46-47). Throughout the United States, milk is regularly exported from rural dairy production areas into the more densely populated urban states. Of the six New England states, only the two most sparsely populated — Vermont and Maine —

are "export states." (JA46-47). Dairy farmers within those two states produce far more milk than is consumed there. The excess milk is exported across state lines and sold to milk dealers, such as the Petitioners, who package milk for consumers in the more densely populated New England states. (JA46-47). Massachusetts is an import state: it only produces a small fraction of all of the dairy products,[4] and ten percent of the fluid milk, sold in the state. (JA66).

The Federal Orders establish, among other things, the minimum prices that milk dealers must pay for milk purchased from dairy farmers. Under this pricing system, milk is divided into three classes based upon the form in which it is used: Class I is primarily fluid milk; Class II includes products such as yogurt and ice cream; and Class III includes products such as butter, cheese, and powdered milk. 7 U.S.C. § 608c(5)(A); 7 C.F.R. § 1001.40. Under the federal system, each class of milk is assigned a minimum price.

Milk dealers pay for milk based upon how they use it. Each dairy farmer, however, receives a uniform minimum price for his or her milk, regardless of how the milk is ultimately used by the dealer. This is achieved by pooling the proceeds of milk for all three classes and distributing to producers an average of the three prices, referred to as the "blend" price. 7 U.S.C. § 608c(5)(B)(ii).

In setting minimum prices, the Secretary must consider economic conditions in *all* production areas and consuming centers serving the regulated region. *Lehigh Valley Coop.* v. *United States*, 370 U.S. 76, 91-98 (1962); 7 U.S.C. § 608c(18). No provision in a marketing order may favor dairy

[4] At one point in the record below, in support of an Emergency Motion for a Preliminary Injunction, it was represented that thirty-five percent of all of the dairy products sold in Massachusetts are produced in Massachusetts. (JA66). This figure was reported in error. The actual percentage is considerably less than thirty-five percent.

farmers in one state over dairy farmers in other states. 7 U.S.C. § 608c(5)(G).

Nothing in the Act expressly precludes a state from supporting its dairy farmers. Nor does the Act expressly preclude a state from setting minimum prices within the state above the federal minimum price.

II. The Pricing Order

On January 28, 1992, the Commissioner of the Massachusetts Department of Food and Agriculture (the "Commissioner") issued a Pricing Order. (JA32).[5] The Pricing Order was promulgated after a series of hearings conducted by a Special Commission appointed by the Governor to investigate and study the Massachusetts dairy industry. (JA11, 26-27). After its investigation, the Special Commission issued a Report (the "Report") (JA10) and determined that the Massachusetts dairy industry was "slowly being overrun by big business in the larger milk producing states in the mid-west." (JA13).

The Special Commission also determined that the Federal minimum price that Massachusetts dairy farmers receive for their milk "does not reflect the significantly higher costs of maintaining an agricultural enterprise in this area of the country, particularly since the industry in the [Minnesota-Wisconsin] region consists largely of 'factory farms,' with huge herds, vast acreage and the ready availability of both supplies and labor, as opposed to New England, where small, family operations are the rule." (JA15). The Special Commission, therefore, recommended that minimum prices to be paid to Massachusetts dairy farmers should be "increased to stabilize milk prices and ensure the viability of the Massachusetts dairy indus-

[5] The Pricing Order was subsequently amended on February 26, 1992. (JA32).

try." (JA23). Without such measures, the Special Commission concluded, "our milk will [have to] be trucked in from other states like Pennsylvania and Ohio." (JA18).

Following the issuance of the Special Commission's Report,[6] the Commissioner declared the existence of a state of emergency in the Massachusetts dairy industry.[7] (JA25-31). The essence of the declaration is that Massachusetts dairy farmers are selling their farms and going out of business because they cannot compete successfully with dairy farmers in other states. (JA25-31). Upon the basis of this declaration and the referenced Special Commission Report, the Commissioner promulgated the Pricing Order. (JA30-31,32).

The Pricing Order is a three-part regulatory scheme. First, it establishes a minimum price "to be paid by milk dealers to Massachusetts producers above the federally established minimum milk price." (JA32). The Commissioner then established the target price at $15.00 per hundredweight (cwt). (JA32, 35). The $15.00/cwt figure was derived from testimony

[6] The Commissioner relied extensively on the Special Commission's Report in determining that a "State of Emergency" existed with respect to the Massachusetts dairy farmers. (JA25-31). The Commissioner stated:

> In May of 1991, a Special Commission to Investigate and Study the Dairy Industry in Massachusetts was appointed by the Governor. The commission held public hearings, met on several occasions and provided a written report to the General Court, which concluded that the Commonwealth's dairy farmers are facing a crisis. This report is attached and incorporated herein . . .

(JA26-27). The Commissioner concluded that since the Report was issued, "little has changed to improve the situation confronting these farmers." (JA27).

[7] In his declaration, the Commissioner stressed "[i]f no action is taken, the entire New England dairy industry will collapse and milk will be imported from greater and greater distances." (JA29). The Commissioner concluded:

> In order to alleviate the situation facing our milk industry, a system of price stabilization must be implemented as quickly as possible to ensure the dairy farmer a fair price for his commodity, reflective of the cost of production in New England.

(JA30).

given by Massachusetts dairy farmers to the Special Commission at public hearings held on May 6 and 7, 1991. (JA12,21, 23,27). This was the price that the Massachusetts dairy farmers said that they wanted. (JA20-22).

Two problems were created when the Commissioner concluded that he wanted to protect Massachusetts dairy farmers by guaranteeing them a minimum price of $15.00/cwt. First, he had to find a way to provide funds to pay the farmers more than the federal price. (JA35-37). His second problem was that milk dealers would naturally be inclined to buy lower priced raw milk from farmers in neighboring states selling at less than $15.00/cwt — which had in fact been the situation in the past. (JA10-24). Responding to these problems, the Commissioner, therefore, designed a regulatory pricing scheme which would permit local dairy farmers to benefit from the higher price without suffering the market consequences of charging a higher price. (JA32-40).

The Pricing Order's structure is cumbersome by design.[8] First, the Pricing Order establishes the $15.00/cwt minimum price to be received by Massachusetts farmers, but not out-of-state farmers, for the milk Massachusetts farmers produce. (JA35-37). Second, the Pricing Order establishes a funding source — an assessment imposed on all Class I milk sold by milk dealers in Massachusetts. (JA35-36). This assessment is not paid by the milk dealers directly to the Massachusetts farmers.

[8] Although cumbersome by design, the Pricing Order may be simply described. If the Federal blend price were $12.00/cwt (*see infra* note 9 for a mathematical description), $1.00 is payable to Massachusetts dairy farmers through the Fund on milk sold in Massachusetts whether it is: 1) Massachusetts produced milk bottled by a Massachusetts dealer; 2) out-of-state produced milk bottled by a Massachusetts dealer; 3) Massachusetts produced milk bottled by an out-of-state dealer; or 4) out-of-state milk bottled by an out-of-state dealer. Massachusetts dairy farmers will actually receive $3.00/cwt for their milk production (*see infra* note 9), whether their milk is sold in-state or out-of-state or whether it is used for Class I (bottled) or Class II or Class III (manufactured dairy products) purposes.

Instead, the Pricing Order requires milk dealers, whether located in or out of the Commonwealth, to pay monthly assessments to the Commissioner based on the amount of Class I milk each sells for consumption in Massachusetts, even if the milk dealer purchased its raw milk from out-of-state dairy farmers. (JA35-36). The assessment paid by each milk dealer is based on one-third of the difference between $15.00/cwt and the federal blend price for milk, multiplied by the amount of Class I milk the dealer sold in Massachusetts during the previous month. (JA35-36).[9]

The assessments collected by the Commissioner are not deposited into the General Fund of the Commonwealth of Massachusetts. (JA35). Instead, the Commissioner deposits the assessments into a separate trust fund, the Massachusetts Dairy Equalization Fund (the "Fund"). (JA35). On the fifth day of the following month, the amounts paid into the Fund are distributed to Massachusetts dairy farmers based on each farmer's pro-rata share of the milk produced in the state. (JA36).[10]

[9] Assuming that the federal blend price were $12.00, the milk dealer's assessment would be $1.00 ($15.00 minus $12.00, divided by three). (JA35-36). This $1.00 is then multiplied by the amount of Class I milk per hundredweight (cwt) the milk dealer sold in Massachusetts that month. (JA35-36). Continuing this example, assume that a milk dealer sold 100,000 cwt of Class I milk in Massachusetts. The milk dealer's assessment payment for that month would be $100,000.00. While assessment payments under the Pricing Order are calculated by subtracting the federal blend price from the $15.00 minimum price and then dividing by three (JA35), Massachusetts farmers will nonetheless receive $15.00/cwt for the milk they produce. A divisor of three is used because Massachusetts has determined that Massachusetts milk production is one-third of fluid milk consumption in the state. Therefore, in this example, a $1.00/cwt assessment on dealers will produce $3.00 for Massachusetts dairy farmers.

[10] The Massachusetts farmers receive monthly distributions from the Fund based on "their proportion of milk produced in Massachusetts." (JA36). Thus, if Farmer A produced 100,000 cwt of milk and the total amount produced by Massachusetts farmers were 1,000,000 cwt of milk, Farmer A would have produced 10% of the milk produced in Massachusetts. He would therefore be entitled to 10% of the total amount in the Fund. Assuming that $1,000,000.00 is in the Fund, Farmer A would receive $100,000.00. (JA36).

It is significant that although most of the money paid into the Fund is derived from the sale of out-of-state milk, out-of-state dairy farmers receive no distribution of monies from the Fund. (JA36,66). During the months of May through September, 1992, the Massachusetts dairy farmers received approximately $3 Million from the Fund. (JA82). Because 90% of the fluid milk sold in Massachusetts is imported from out-of-state (JA66), $2.7 Million of the $3.0 Million distributed to Massachusetts farmers was generated directly from the sale of out-of-state milk. The purpose of this transfer of millions of dollars was, as stated by the Commissioner in his Declaration, to bolster the economic position of Massachusetts dairy farmers, and to reduce competition from the more efficient dairy farmers in other states. (JA11,13,15).

From the time the Pricing Order was promulgated, the Petitioners have believed that the Massachusetts regulatory scheme, the Pricing Order, discriminates against interstate commerce. Because the Petitioners purchase virtually all of their milk from out-of-state farmers (JA49) and these out-of-state farmers are being required by Massachusetts to use their milk as a revenue source for improving the economic position of Massachusetts farmers who are their competitors, the Petitioners instituted this civil rights action in the Massachusetts Trial Court. (JA44).[11]

SUMMARY OF THE ARGUMENT

The Massachusetts Pricing Order discriminates against interstate commerce. It promotes precisely the kind of economic warfare among the states that the Framers of the Constitution

[11] The full procedural history appears at *West Lynn Creamery, Inc. et al.* v. *Commissioner of Department of Food and Agriculture*, 415 Mass. at 12-14, 611 N.E.2d at 241 (JA22-25).

sought to eliminate. The dormant Commerce Clause promotes economic unity. The Pricing Order causes disunity by favoring local industry at the expense of out-of-state industry: it categorically discriminates against interstate commerce in violation of the Commerce Clause.

This Court has concluded that a state law violates the Commerce Clause when it is discriminatory in purpose or effect. State laws that are protectionist in purpose or that seek to mitigate the consequences of competition by industry in other states have been held to violate the Commerce Clause. *See, e.g., Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U.S. 573, 580 (1986) *citing Baldwin* v. *G.A.F. Seelig*, 294 U.S. 511, 528 (1935). The leading case in the area is *Baldwin*. *Baldwin* involved a New York law which established a minimum price for in-state and out-of-state milk. *Baldwin*, 294 U.S. at 519-520. The purpose of the law was to insulate New York farmers from the economic consequences of lower priced out-of-state milk. *Id.* This Court held the New York law unconstitutional both because of its purpose and its effect — removing the economic incentive for a local dealer to purchase out-of-state milk. The Pricing Order involved in this case is similar to the New York law in *Baldwin*: both have a protectionist purpose and both eliminate the competitive advantage that out-of-state producers have over in-state producers.

Massachusetts has argued that its purpose in promulgating the Pricing Order was to "aid" the Massachusetts dairy farmer. (JA128). In *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984), however, this Court held that aiding an in-state industry is not sufficient to save a state law that is being challenged under the Commerce Clause. The Commerce Clause inquiry does not depend upon whether one focuses on the benefitted or the burdened party. *Id.* at 273.

Massachusetts has also argued that the Pricing Order seeks to ensure a fresh and adequate supply of milk to Massachusetts consumers and that this purpose protects the Pricing Order from a Commerce Clause challenge. (JA29). This argument is contrived to help save the Pricing Order. Indeed, the Secretary of Agriculture has concluded in each of the past three years that the supply of milk being produced for Massachusetts consumers is adequate. *See* 58 Fed. Reg. 12634, 12647-12648 (1993); 56 Fed. Reg. 58972 (1992); 55 Fed. Reg. 50934 (1991). In any case, the *Baldwin* court rejected this exact argument holding that states must employ non-discriminatory means to accomplish purposes that might otherwise be within their police power. *Baldwin*, 294 U.S. at 522-523.

The Pricing Order does not have a constitutionally permissible purpose and it has a discriminatory effect. *Id.* It stifles out-of-state competition, as did the New York law in *Baldwin*. *Id.* at 527. In this case, as in *Baldwin*, the states have sought to insulate in-state dairy farmers by establishing a minimum price to be paid by milk dealers on all milk no matter where it was produced — in-state or out-of-state. *Id.* In this case, the Pricing Order has a greater discriminatory effect than the New York law in *Baldwin*. In *Baldwin*, the Vermont farmers received the minimum state price; in Massachusetts, the out-of-state farmers not only do not receive the minimum state price, out-of-state milk is used to pay local farmers a price that is greater than what they would otherwise receive. Thus, the Pricing Order is less "even handed" than the New York law scrutinized in *Baldwin*. In any case, the *Baldwin* Court held, notwithstanding that less discriminatory context, that the appearance of even-handedness is not sufficient to protect an otherwise discriminatory law from a Commerce Clause challenge.

The State's reliance on *Milk Board* v. *Eisenberg*, 306 U.S. 346 (1939) is inapposite. *Eisenberg* involved a Pennsylvania

law that established a minimum price that Pennsylvania dealers were required to pay to Pennsylvania dairy farmers. The Pennsylvania law in no way affected the prices paid to out-of-state farmers as does the Pricing Order. The Pennsylvania law also did not seek to raise money from the sale of out-of-state milk to provide economic assistance to in-state farmers. That assistance is, however, one of the burdens created by the Massachusetts Pricing Order. Thus, *Eisenberg* involved a Pennsylvania law which principally affected intrastate commerce. On the other hand, this case involves a law with a demonstrated interstate effect which is discriminatory.

The State's reliance on *Henneford* v. *Silas Mason Co.*, 300 U.S. 577 (1937) is inapposite. *Henneford* involved Washington's efforts to level the playing field by imposing a use tax to equal the sales tax imposed on the sale of local goods. This Court held that the purpose of the Washington law, to equalize the tax burdens, did not burden interstate commerce. This case does not involve a state effort to remove a tax disadvantage; it involves a state effort to protect a local industry from a competitive disadvantage.

The Pricing Order is not a subsidy. The Order itself says that it "sets a target minimum price to be paid by milk dealers to Massachusetts producers." (JA32). In fact, the Commissioner never uses the word subsidy in his Order. He now seeks to call it a subsidy, but this is an after the fact rationale. The Pricing Order has none of the characteristics of a subsidy: it is not funded by state revenues that are raised by taxing state residents who have voted for legislators who have approved the tax and the expenditure.

If this Court were to analyze the Pricing Order under *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970), it would also conclude that the Pricing Order violates the Commerce Clause. The local purpose, driven by protectionism, does not compare to the excessive burden on interstate commerce. In addition,

the State has not shown that there are no other alternatives for helping Massachusetts dairy farmers other than the discriminatory scheme that has been put into effect by the Commissioner through his Pricing Order.

ARGUMENT

The Massachusetts Pricing Order Discriminates Against Interstate Commerce

The Commerce Clause explicitly grants power to Congress "[t]o regulate Commerce with foreign Nations, and among the several States. . ." U.S. Const. art. I, § 8, cl. 3. A basic purpose of the Commerce Clause is to prevent states from discriminating against foreign commerce, including out-of-state commerce. *New Energy Co. of Indiana* v. *Limbach*, 486 U.S. 269, 273-274 (1988). As this Court has reiterated on many occasions, "[t]his 'negative' aspect of the Commerce Clause prohibits economic protectionism — that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Wyoming* v. *Oklahoma*, 112 S. Ct. 789, 800 (1992) *quoting Limbach*, 486 U.S. at 273-274.

This Court's rationale in shaping the dormant Commerce Clause is rooted in history.[12] After all, economic warfare among the states convinced the Framers that:

> [I]n order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization

[12] *See, e.g.*, Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U.L.R. 43 (1988). Professor Collins notes, "[s]ince early in the nineteenth century the Supreme Court has promoted economic union by invalidating state laws that were hostile to" the Commerce Clause. *Id.*

> that had plagued relations among the Colonies and later among the States under the Articles of Confederation.

Hughes v. *Oklahoma*, 441 U.S. 322, 325 (1979) *citing H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 533-534 (1949).[13]

> This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control the economy, including the vital power erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units. As the Court said in *Baldwin* v. *G.A.F. Seelig, Inc.*, [294 U.S. 511, 527 (1935)] "what is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation."

H.P. Hood & Sons, Inc. v. *Du Mond*, 336 U.S. at 537-538 *citing Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. at 527.[14]

The Massachusetts Pricing Order violates the principle of economic unity that has been historically promoted by this

[13] *See also*, The Federalist, Nos. 7 and 11, where Hamilton cited the potential dangers of commercial rivalry amongst the States as being reasons for ratifying the Constitution.

[14] *See also*, Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091 (1986). Summarizing the "conventional wisdom" regarding the historical underpinnings of the Commerce Clause, Professor Regan notes, "[t]he people who wrote our actual Constitution in 1787 were well aware" of the danger of state protectionism. "They saw states enacting protectionist restrictions; they saw other states retaliating; and they feared not merely for the economic health, but also and even more for the political viability of the infant United States." *Id.* at 1114.

Court. The Pricing Order, stripped of its formulas and details, is a state law that blatantly promotes local industry at the expense of out-of-state industry. It promotes local industry by boosting the minimum price of milk to a level recommended by that local industry, it provides funding for the increased minimum price almost entirely from the sale of out-of-state milk, and it prevents out-of-state industry from underselling local industry by imposing an assessment on all milk wherever the source is located. In other words, this state Pricing Order violates the basic purpose of the dormant Commerce Clause: it categorically discriminates in favor of local businesses and against directly competing out-of-state businesses. *Hughes* v. *Oklahoma*, 441 U.S. at 336-337.

I. The Pricing Order Is a Per Se Violation of the Commerce Clause Because it is Both Discriminatory in Purpose and Effect.

This Court follows a two-step analysis in determining whether a state law or regulation violates the Commerce Clause. *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U.S. at 578-579; *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981). If a state statute or regulation is discriminatory either in purpose or effect, then this Court has applied a *per se* rule of invalidity. *Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978) *citing H.P. Hood & Sons, Inc.*, 336 U.S. at 525 and *Baldwin*, 294 U.S. at 521. Such discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of non-discriminatory alternatives. *Wyoming* v. *Oklahoma*, 112 S. Ct. at 800.

On the other hand, where the state law regulates even-handedly, to effectuate a legitimate local purpose, and its effects on

interstate commerce are only incidental, the state law will be upheld unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits. *Pike* v. *Bruce Church, Inc.*, 397 U.S. at 142. Here, this Court need not apply the second step in the analysis because the Pricing Order is discriminatory both in purpose and effect, and, therefore, the *per se* rule of invalidity should be applied.

This Court has held that state regulations that amount to "simple economic protectionism" are *per se* violations of the Commerce Clause. *Wyoming* v. *Oklahoma*, 112 S. Ct. at 800. An example of such economic protectionism includes state statutes or regulations which are designed to mitigate the consequences of competition between the states. *Brown-Forman Distillers Corp.*, 476 U.S. at 580 *citing Baldwin*, 294 U.S. at 528. *See also, Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 351 (1977).

The seminal case restricting the states' powers to regulate interstate commerce is *Baldwin*. In *Baldwin*, this Court held that a state, in the interest of protecting its dairy farmers, could not insulate its in-state milk industry from competition from other states. *Baldwin*, 294 U.S. at 527-528. There, New York had established minimum milk prices to be paid by milk dealers to producers. *Id.* at 519-520. For products originating within the state, this Court did not take issue with New York's minimum price law. *Id.* at 519.[15] Instead, it focused on that portion of the New York law which fixed a minimum price for milk imported from other states. *Id.* The New York statute required milk dealers to pay the New York minimum price to out-of-state producers if the milk dealer wanted to sell its milk in New York. *Id.*

New York included milk produced in other states within its minimum price laws to insulate local farmers from competition

[15] The Petitioners do not contest the state's power to fix minimum prices for milk produced and sold within the state. Such regulations have been held to be constitutionally valid. *See Nebbia* v. *New York*, 291 U.S. at 502.

from neighboring states. *Id.* Without that portion of the law, New York milk dealers would have been encouraged to buy their milk out-of-state to avoid paying the artificially high in-state milk prices created by the statute. *See id.* at 519-520. In other words, New York artificially raised the price of out-of-state milk, as well as in-state milk, so that out-of-state producers could not underprice the local product. *See id.*

The *Baldwin* Court struck down New York's statutory scheme because the law unconstitutionally removed any economic incentive for a local dealer to purchase out-of-state milk. *Id.* at 522-523. This Court reasoned that out-of-state milk producers were denied an opportunity to compete with New York produced milk and concluded:

> The importer must be free from imposts framed for the very purpose of suppressing competition from without and leading inescapably to the suppression so intended.
>
> The statute here in controversy will not survive that test. A dealer in milk buys it in Vermont at prices there prevailing. He brings it to New York, and is told he may not sell it if he removes it from the can and pours it into bottles. He may not do this for the reason that milk in Vermont is cheaper than milk in New York at the regimented prices, and New York is moved by the desire to protect her inhabitants from the cut prices and other consequences of Vermont competition.

Id. at 527.

Like the statute in *Baldwin*, the Pricing Order was designed to isolate the Massachusetts dairy farmers from competition from other states, and has the effect of eliminating the competitive advantage that out-of-state producers have over Massachu-

setts producers.[16] Indeed, the barrier created by the Pricing Order has a more substantial discriminatory effect[17] than the statute in *Baldwin*.[18]

A. The Pricing Order Has the Same Discriminatory Purpose as the Statute in *Baldwin*.

As previously discussed, Massachusetts' purpose in enacting the Pricing Order was economic protectionism and discrimination against out-of-state competition in the Massachusetts milk market.[19] The Report of the Special Commission, expressing its concern that Massachusetts farmers were "slowly being overrun by big business in the larger milk producing states in the mid-west," is the most revealing evidence of Massachusetts' protectionist purpose. (JA13).

[16] The Massachusetts court assumed, without deciding, that the Petitioners, as milk dealers, had standing to raise this constitutional challenge to the Pricing Order. *West Lynn Creamery, Inc.*, 415 Mass. at 16, 611 N.E.2d at 244 (JA127-128). This Court's decision in *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. at 263, however, makes it clear that the Petitioners have standing to challenge the Pricing Order. There, this Court rejected the argument that wholesalers did not have standing to challenge an excise tax on Commerce Clause grounds, despite the fact that the wholesalers had passed on some of the tax to their customers. *Id.* at 267. First, this Court noted that the wholesalers were liable for the tax. Second, this Court stated that "even if the tax is completely and successfully passed on, it increases the price of their products. . . ." *Id.* This Court reasoned "[a]lthough they may pass it on to their customers, and attempt to do so, they must return the tax to the State whether or not their customers pay their bills." *Id.* Thus, this Court concluded that the "wholesalers plainly have standing to challenge the tax. . . ." *Id.* Since the Petitioners, like the wholesalers in *Bacchus*, are responsible for making the assessment payments under the Pricing Order, the Petitioners plainly have standing to challenge its constitutionality.

[17] The fact that the Pricing Order is more economically harmful to out-of-state farmers, and those who deal with them, is further discussed *infra* at pp. 23-25.

[18] Three Federal District Court decisions, relying on *Baldwin*, recently struck down state milk pricing schemes substantially similar to the Pricing Order, holding that the regulations were *per se* violations of the Commerce Clause. *Marigold Foods et al.* v. *Redalin*, No. 4-92-1084, slip op. 1993 U.S. Dist. LEXIS 15019 (D. Minn. October 20, 1993); *Farmland Dairies* v. *McGuire*, 789 F. Supp. 1243 (S.D.N.Y. 1992); *Marigold Foods* v. *Redalin*, 809 F. Supp. 714 (D. Minn. 1992).

[19] *See supra* pp. 6-8 and accompanying notes.

This Court has consistently struck down as violative of the Commerce Clause state statutes and regulations with purposes identical to the purpose of the Pricing Order. *See Limbach*, 486 U.S. at 269; *Brown-Forman Distillers Corp.*, 476 U.S. at 573; *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. at 263; *Philadelphia* v. *New Jersey*, 437 U.S. at 617; *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. at 333; *Polar Ice Cream & Creamery Co.* v. *Andrews*, 375 U.S. 361 (1964); *H.P. Hood & Sons.* v. *Du Mond*, 336 U.S. at 525; *Baldwin*, 294 U.S. at 519. State parochialism designed to discriminate against interstate commerce in favor of local interests is foreclosed by *Baldwin*. *See also, Polar Ice Cream and Creamery Co.* v. *Andrews*, 375 U.S. at 361; *H.P. Hood & Sons* v. *Du Mond*, 336 U.S. at 525. Despite the fact that the Pricing Order has a clear protectionist purpose, the State has argued that the Pricing Order is not a protectionist measure, since it was designed to "aid" Massachusetts farmers "to save [the] industry from collapse." *West Lynn Creamery, Inc.*, 415 Mass. at 17, 611 N.E.2d at 244 (JA128). This Court, however, has held "it is irrelevant to the Commerce Clause inquiry whether the motivation of the legislature was the desire to aid the makers of the locally produced [product] rather than to harm out-of-state producers." *Bacchus*, 468 U.S. at 273. In *Bacchus*, Hawaii imposed an excise tax on sales of liquor at the wholesale level. A locally produced Hawaiian wine was exempted from the excise tax. *Id.* at 265. Although the tax was discriminatory on its face, Hawaii argued that the tax was not protectionist because it was not enacted to discriminate against out-of-state goods, but rather to promote the local wine industry. *Id.* at 273. This Court rejected Hawaii's argument, concluding that the determination of constitutionality does not depend upon whether one focuses on the benefited or the burdened party. *Id.* The *Bacchus* Court also noted that "the propriety of economic protectionism may not be allowed to

hinge upon the State's . . . characterization of the industry as either 'thriving' or 'struggling.'" *Id.* The *Bacchus* Court reasoned:

> [W]e perceive no principle of Commerce Clause jurisprudence supporting a distinction between thriving and struggling enterprises. . . In either event, the legislation constitutes "economic protectionism" in every sense of the phrase.

Id. at 272. Accordingly, Massachusetts' characterization of the Pricing Order as a measure designed to "aid" Massachusetts farmers, rather than harm out-of-state farmers, cannot save the Pricing Order from constitutional infirmity.

B. The Secondary Purpose Asserted by the Commonwealth, that the Pricing Order Ensures a Fresh Supply of Milk, Does Not Justify Discriminating Against Interstate Commerce.

The State has argued that a secondary purpose of the Pricing Order is to insure an adequate supply of milk to the Commonwealth, the supply having supposedly been put in jeopardy because the Massachusetts farmers are unable to earn an adequate income.[20] This argument, however, is foreclosed by

[20] This secondary purpose is plainly contrived to justify the Pricing Order's real purpose — to protect the Massachusetts farmers from competition. (JA10-24). Controverting the Commissioner's findings of threatened supply, the United States Secretary of Agriculture has frequently addressed the New England supply issue. His most recent conclusions were published in 1991, 1992, and 1993. 58 Fed. Reg. 12634, 12647-12648 (1993); 56 Fed. Reg. 58972 (1992); 55 Fed. Reg. 50934 (1991). On each occasion his conclusion was the same: the federal order prices established for New England were adequate to "insure a sufficient supply of pure and wholesome milk" for the market. 58 Fed. Reg. 12634, 12674 (1993).

Baldwin. *See Wyoming* v. *Oklahoma*, 112 S. Ct. at 802 *citing Baldwin*, 294 U.S. at 511 and *H.P. Hood & Sons, Inc.*, 336 U.S. at 525. In *Baldwin*, this Court made it clear that the evil of protectionism can reside in legislative means as well as legislative ends. *Baldwin*, 294 U.S. at 522-523. In fact, this Court recently noted, "[w]e have often examined a 'presumably legitimate goal,' only to find that the State attempted to achieve it by the 'illegitimate means of isolating the State from the national economy.'" *Wyoming* v. *Oklahoma*, 112 S. Ct. at 802 *quoting Philadelphia* v. *New Jersey*, 437 U.S. at 627. *See also, Chemical Waste Management, Inc.* v. *Hunt*, 112 S. Ct. 2009 (1992). Indeed, in *Baldwin*, this Court specifically held that legitimate state power to regulate commerce for health and safety reasons could not be invoked to validate an otherwise discriminatory statute. *Baldwin*, 294 U.S. at 522-523. There, this Court did not accept state arguments concerning the preservation of the quality of milk as a guise for the protection of the economic welfare of the state's dairy farmers. The *Baldwin* Court stated:

> If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation. . . . Economic welfare is always related to health for there can be no health if men are starving.

Id. See also, H.P. Hood & Sons, 336 U.S. at 538 ("the state may not use its admitted powers to protect the health and safety of its people as a basis for suppressing competition"). The *Baldwin* Court concluded that despite the purported legitimate

local purpose of the New York statute, it was unconstitutional because it "neutralize[d] the economic consequences of free trade among the states." *Baldwin*, 294 U.S. at 527.

As discussed below, the effect of the Pricing Order, like the statute in *Baldwin*, is to economically isolate Massachusetts dairy farmers from the national economy. Therefore, as in *Baldwin*, the State cannot save the discriminatory Pricing Order by claiming that the end to be served is legitimate. As the *Baldwin* court warned, "[t]o give entrance to that excuse would be to invite a speedy end to our national solidarity." *Id.* at 523.

C. The Pricing Order is Discriminatory in Effect.

The Pricing Order is also discriminatory in effect. Like the statute in *Baldwin*, the Pricing Order establishes "a minimum price to be paid by milk dealers to Massachusetts producers" for both the purchase of in-state and out-of-state milk. (JA32). The Pricing Order achieves this minimum price by requiring milk dealers to pay an assessment — one-third of the difference between $15.00/cwt and the federal blend price — into the Fund. (JA32,35). Because the assessment is imposed on all milk sold in Massachusetts, milk dealers must pay the minimum Massachusetts price for all milk, including milk purchased out-of-state. (JA36). By establishing a minimum price for both in-state and out-of-state milk, the Pricing Order effectively cancels out the economic advantage that lower-priced, non-Massachusetts milk would otherwise have over milk produced in Massachusetts. The Pricing Order, therefore, denies out-of-state milk an opportunity to compete with in-state milk because out-of-state milk is subject to the additional payment if it is sold in Massachusetts. This is precisely the discriminatory effect prohibited by *Baldwin*. *See also, Brown-Forman Distillers Corp.*, 476 U.S. at 580 *citing Baldwin*, 294 U.S. at 528 (state "may not insist that producers or consumers in other states surrender whatever competitive advantages they may possess").

Despite the striking similarities between the Pricing Order and the statute in *Baldwin*, Massachusetts has argued, and the Massachusetts court agreed, that the Pricing Order is not a *per se* violation of the Commerce Clause. The Massachusetts court reasoned that the Pricing Order is "evenhanded in its application" because "[a]ll milk dealers that sell Class I milk for consumption in Massachusetts are required to contribute to the Fund." *West Lynn Creamery, Inc.*, 415 Mass. at 15-16, 611 N.E.2d at 243 (JA126). But it is not just who contributes to the Fund that is the gravamen; it is also who takes out of the Fund. Almost all money paid into the Fund comes from out-of-state milk sources, while all the money paid out is given to in-state producers. Moreover, this Court has consistently struck down state laws that have the appearance of being evenhanded, when the purpose or effect of the regulation is discriminatory. *See, e.g., Brown-Forman Distillers Corp.*, 476 U.S. at 573; *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. at 333; *Baldwin*, 294 U.S. at 511. Indeed, this evenhandedness argument was considered and rejected by this Court in *Baldwin*. There, this Court recognized that the New York law was evenhanded because it established the same minimum price for in-state and out-of-state milk. *Baldwin*, 294 U.S. at 521. This Court held, however, that the establishment of a minimum price applicable to out-of-state milk constituted an "unreasonable clog upon the mobility of commerce" because it attempted to protect in-state dairy farmers "from the cut prices and other consequences of competition." *Id.* at 527.

The discriminatory effect of the Pricing Order is even more egregious than in *Baldwin*. In *Baldwin*, the Vermont farmers actually received the difference between the market price and the state minimum price for milk sold in New York. *See id.* at 519. Here, that differential does not go to out-of-state farmers; it is paid over to the Massachusetts farmers instead. That exacerbates the constitutional problem.

The Massachusetts court incorrectly distinguished the effect of the Pricing Order from the statute in *Baldwin* by arriving at the erroneous conclusion that "[t]he Pricing Order does not establish a minimum price milk dealers must pay for milk regardless of origin." *West Lynn Creamery, Inc.*, 415 Mass. at 16, 611 N.E.2d at 243 (JA126). In support of this position, the Massachusetts court stated that "milk dealers have every reason to seek out the lowest unit price for milk as it will reduce their costs." *Id.*, 611 N.E.2d at 244 (JA127). This conclusion completely ignores the effects of the Pricing Order[21] and this Court's decision in *Baldwin*. While milk dealers will always have the incentive to purchase milk at a lower price, the Pricing Order eliminates their ability to do so. As in *Baldwin*, the Pricing Order eliminates any incentive that milk dealers may have had to purchase lower priced milk from out-of-state farmers. Such incentives are eliminated because the milk dealers are required to make assessment payments on all milk purchased out-of-state, and thus, any savings otherwise derived from reducing the purchase price are absorbed by the increased assessment.

[21] If the federal blend price for milk were $12.00, under the Pricing Order, the assessment payments would be equal to the difference between $15.00 and $12.00 divided by three, or $1.00. (JA35-36). This $1.00 would be multiplied by the amount of Class I milk the dealer sold in Massachusetts. (JA36). Further assume that a Class I milk dealer purchases 500,000 cwt of milk from out-of-state farmers and 500,000 cwt of milk from Massachusetts farmers, and sells all the milk it purchases as Class I milk in Massachusetts. The milk dealer's assessment payment would be $1,000,000. (JA35-36). Purchasing more milk from out-of-state farmers, as the Massachusetts court suggests, would not reduce the milk dealer's costs: if the milk dealer were to purchase all of its milk, 1,000,000 cwt, from out-of-state farmers and no milk from Massachusetts farmers, its assessment payable to Massachusetts farmers would still be $1,000,000. Therefore, buying out-of-state milk simply will not reduce the milk dealer's costs.

D. The Pricing Order is Not a Limited Regulation of Intrastate Commerce.

Relying on *Milk Board* v. *Eisenberg Co.*, 306 U.S. at 346, Massachusetts has asserted that the Pricing Order is constitutional because it "does not 'attempt to regulate the price to be paid for milk in a sister state. . . .'" (Respondent's Brief in Opposition to Petition for Certiorari at 18-20 *citing Eisenberg*, 306 U.S. at 353). The statute in *Eisenberg*, however, is wholly different from the Pricing Order. In *Eisenberg*, Pennsylvania set a minimum price that milk dealers had to pay for milk produced in Pennsylvania. A local dealer argued that the statute burdened interstate commerce because the dealer intended to ship his milk out-of-state after purchasing it in Pennsylvania. This Court upheld the statute, despite the argument that there was an indirect effect on interstate commerce. *Eisenberg*, 306 U.S. at 353.[22]

The Commissioner's reliance on *Eisenberg* is inapposite. The issue in the case before this Court does not involve the Commissioner's authority to fix a minimum price for milk: this minimum price law does not only apply to Massachusetts produced milk. The Pricing Order, like the statute in *Baldwin*, effectively sets a minimum price for *all* milk, by requiring dealers to make assessment payments to Massachusetts dairy farmers through the Fund, based on the total amount of milk sold in Massachusetts, regardless of where the milk was originally purchased. (JA35-36).

The Pricing Order, like the statute in *Baldwin*, regulates the cost of milk produced in other states. The statute in *Eisenberg*, however, operated only intrastate and the milk dealer in *Eisenberg*, unlike the milk dealer in Massachusetts, could purchase its milk at lower prices from other states. Purchasing milk from out-of-state, of course, would cause economic harm to the local farmers involved in the *Eisenberg* case. The Commerce Clause, however, does not necessarily preclude states from burdening local industry, explaining the result in *Eisenberg*; the Commerce Clause does preclude the states from discriminating against industry in other states, explaining the result in *Baldwin*.[23]

[22] The *Eisenberg* Court concluded that the Pennsylvania statute had only an incidental effect on interstate commerce. This conclusion was based in part on the fact that "only a small fraction of the milk produced . . . in Pennsylvania is shipped out of the Commonwealth." *Id.*

E. The Pricing Order is not a Constitutional Use Tax Under *Henneford* v. *Silas Mason Co.*, 300 U.S. at 577.

This case is distinguishable from the compensatory "use tax" upheld in *Henneford* v. *Silas Mason Co.*, 300 U.S. at 577. "Equal treatment of interstate commerce . . . has been the common theme in which this Court has sustained 'compensating' state use taxes." *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318, 331 (1977) *quoting Henneford*, 300 U.S. at 577. In *Henneford*, Washington state imposed a use tax on goods purchased out-of-state by Washington residents who then brought those goods for use into Washington. *Henneford*, 300 U.S. at 579. The use tax was set at the same rate as the Washington state sales tax on goods purchased in Washington, and was paid into the state's general tax fund. *Id.* at 581. The *Henneford* Court acknowledged that the effect of the tax was to help Washington retailers compete "upon terms of equality with retail dealers in other states. . ." *Id.* Therefore, the Court concluded that the use tax did not burden

[23] In the view of one author, *Eisenberg* is explained as follows: "The Pennsylvania regulation did not distribute its burden more heavily on milk distributors and consumers outside the state than on those within. Indeed, Pennsylvania producers exported only about ten percent of the milk subject to the minimum price regulation to other states." Smith, *State Discrimination Against Interstate Commerce*, 74 Calif. L. Rev. 1203, 1214 (1986).

interstate commerce because the effect of the tax was nondiscriminatory treatment of in-state and out-of-state purchases. *Id.* at 584.

Unlike the use tax in *Henneford*, the Pricing Order was not promulgated to remove a tax disadvantage, but to give Massachusetts dairy farmers a competitive advantage over out-of-state dairy farmers. (JA10-24). In addition, unlike the use tax in *Henneford*, assessments under the Pricing Order are not paid into the General Fund of the Commonwealth, but are retained in a segregated Fund by the Massachusetts Department of Food and Agriculture. (JA35-38). The monies deposited into this segregated Fund are then distributed to in-state dairy farmers only. (JA36-38). Massachusetts farmers, therefore, receive a direct benefit from the sale of milk produced out-of-state. In *Henneford*, on the other hand, the imposition of the tax did not benefit Washington retailers affirmatively, but rather removed the disadvantage caused by the sales tax. Therefore, unlike the tax in *Henneford*, the payments from milk dealers to the Massachusetts farmers do more than equalize the playing field. Massachusetts farmers receive a higher price for their milk and are protected from suffering a corresponding reduction in sales. *See Farmland Dairies* v. *McGuire*, 789 F. Supp. at 1252-1253.[24]

F. The Pricing Order is not a Constitutional Subsidy.

Massachusetts has argued that the Pricing Order does not violate the Commerce Clause because it provides a subsidy to an in-state industry and does not directly burden out-of-state farmers. Massachusetts, relying on *New Energy Co. of Indiana* v. *Limbach*, 486 U.S. at 278, contends that a state may "sub-

[24] *See also* Regan, *supra* note 14, at 1246.

sidize" domestic industry without violating the Commerce Clause.[25] (Respondent's Brief in Opposition to Petition for Certiorari at 26). The State's argument, however, is fundamentally flawed: the Pricing Order is not a subsidy — it is a regulatory scheme which increases the minimum price to be paid to local dairy farmers and uses milk sales from out-of-state farmers as a revenue source for paying Massachusetts farmers the difference between the market price and the increased minimum price. This regulatory scheme directly impacts interstate commerce — directly favoring in-state interests at the expense of out-of-state interests. Unlike this regulatory scheme, state subsidy programs distribute state funds from the state's treasury to in-state industries: the monies distributed to the in-state industries are not derived from taxing out-of-state sources. Such subsidy programs are presumed to be valid because the states have the power to "limit benefits generated by a state program to those who fund the state treasury and whom the State was created to serve." *Reeves* v. *Stake*, 447 U.S. at 442 (emphasis added); *see also, White* v. *Massachusetts Council of Construction Employees, Inc.*, 460 U.S. 204, 221 (1983) (Blackmun, J., concurring in part and dissenting in part) (state has the power "to limit to state residents the direct benefits of subsidy programs supported with state funds.") (emphasis added). In other words, a state can "channel state

[25] In *Limbach*, this Court did not hold that all state subsidy programs will pass muster under the dormant Commerce Clause. Rather, the Court, in *dicta*, noted that such subsidy programs "might not be characterized as proprietary." *Limbach*, 486 U.S. at 277 *citing Reeves, Inc.*, v. *Stake*, 447 U.S. 429, 440 n.14 (1980) and *Hughes* v. *Alexander Scrap Corp.*, 426 U.S. 794 (1976). This Court, however, has upheld state subsidy programs when the state is acting as a "market participant," rather than as a regulator. *Hughes* v. *Alexander Scrap Corp.*, 426 U.S. at 794. In *Alexander Scrap*, this Court held that when a state acts as "market participant," rather than as a government regulator, it is exempt from Commerce Clause scrutiny. *Id.* at 809-810. Here, Massachusetts has not, and could not, argue that the "market participant" exception applies because Massachusetts' actions in enacting the Pricing Order are, without question, regulatory in nature.

benefits to the residents of the state supplying them." Reeves, Inc. v. *Stake*, 447 U.S. at 443 n.16.[26]

The Pricing Order clearly may not be classified as a subsidy. In fact, the Pricing Order never uses the word subsidy. Instead, the Pricing Order specifically states that it is a measure designed to regulate the producer price of milk: "This Order sets a target minimum price to be paid by milk dealers to Massachusetts producers, above the federally established minimum milk price." (JA32).

As previously stated, 90% of all Class I milk sold in Massachusetts is imported from out-of-state dairy farmers. (JA66). Therefore, most of the money collected into the Fund is derived from the sale of out-of-state milk. To use out-of-state money to support in-state businesses only further fans the flames of

[26] *See also*, Varat, *State "Citizenship" and Interstate Equality*, 48 U. Chi. L. Rev. 487, 541-545 (1981). Professor Varat discusses whether state subsidy programs are valid under the Commerce Clause. Varat stresses that the initial inquiry should be "the nature of the subsidy and its relationship to the comparative tax obligations of resident and nonresident business." *Id.* at 541. In defining the issue, Varat states:

> The issue is best framed by asking whether a state is free to grant direct subsidies to in-state business only, assuming the *state does not tax the in-state activity or income of either resident or non-resident business*. The qualification is necessary, because it is clear that the states are forbidden to tax out-of-state businesses more heavily than in-state businesses, that they may therefore not allow resident businesses tax deductions or exemptions unavailable to nonresident businesses, and that the same impermissible result would be produced if resident and nonresident businesses were equally taxed but only resident businesses received cash subsidy rebates.

Id. at 541-542 (emphasis added). *See also*, Collins, *supra* note 12, at 98. In discussing the constitutionality of state subsidy schemes, Professor Collins, like Professor Varat, assumes that the subsidy program is "paid from general state tax revenues." *Id.* at 98-99 n.332. Professor Collins notes that "*[a]n earmarked tax on locally subsidized goods paid by the industry would presumably be struck down, since the tax and subsidy scheme together would constitute a discriminatory tax.*" *Id.* (emphasis added).

conflict between the states in this case. Since the Pricing Order is an economic regulation, with a funding source derived from the sale of out-of-state goods, the State's argument that subsidy programs are constitutional is simply inapposite.

In the alternative, the State has argued that the Pricing Order is valid because it has the same "impact on interstate activities" as would a subsidy from general tax revenues. (Respondent's Brief in Opposition to Petition for Certiorari at 29). This Court, however, has held that a state's power to directly subsidize its own residents cannot justify economic regulations which attempt to achieve the same goal through the improper regulation of interstate commerce. *Limbach*, 486 U.S. at 278. In *Limbach*, this Court invalidated an Ohio law which awarded a tax credit against the Ohio motor vehicle fuel sales tax for ethanol sold by fuel dealers, but only if the ethanol was produced in Ohio or in a state granting similar tax advantages to ethanol produced in Ohio. *Id.* at 271. While this Court acknowledged, in *dicta*, that Ohio could have provided a direct subsidy to its own ethanol producers, it could not do so by directly regulating interstate commerce. *Id.* at 278. Accordingly, Massachusetts cannot defend the Pricing Order by asserting that it has the same effect as a subsidy that might not be unconstitutional in another form.

II. The Pricing Order Violates the Commerce Clause Because its Burdens on Interstate Commerce Outweigh any In-state Benefits.

If this Court were to conclude, despite *Baldwin*, that the Pricing Order is not a *per se* violation of the Commerce Clause, then the lesser standard of scrutiny articulated in *Pike* v. *Bruce Church, Inc.*, 397 U.S. at 142 should be employed. Under *Pike*, a statute will be struck down if the burdens im-

posed on interstate commerce are "clearly excessive in relation to the putative local benefits." *Maine* v. *Taylor*, 477 U.S. 131, 138 (1986) *citing Pike*, 397 U.S. at 142. "[T]he extent of the burden that will be tolerated will of course depend on the nature of the local interest involved and on whether it could be promoted as well with a lesser impact on interstate activities." *Minnesota* v. *Clover Leaf Creamery, Co.*, 449 U.S. at 471.

Concluding that the Pricing Order does not discriminate against interstate commerce on its face, the Massachusetts court instead applied the lesser standard of scrutiny approved in *Pike*. *West Lynn Creamery, Inc.*, 415 Mass. at 19, 611 N.E.2d at 245 (JA129-130). Applying *Pike*, the court concluded that while the Pricing Order burdened interstate commerce, this burden was "incidental given the purpose and design of the program." *Id.* at 17-18, 611 N.E.2d at 244 (JA128).

Pike, however, requires an inquiry into whether the Pricing Order could be achieved with a lesser impact on interstate commerce. *Minnesota* v. *Clover Leaf Creamery, Co.*, 449 U.S. at 471 *quoting Pike*, 397 U.S. at 142. The Massachusetts court, however, disregarded this aspect of the *Pike* analysis, despite the fact that there are many ways the state could subsidize its in-state dairy producers without violating the Commerce Clause.[27] For example, the state could provide dairy farmers with tax subsidies from the Commonwealth's general tax fund or tax relief in the form of reduced property tax or income tax payments. The State could also provide less direct relief by increasing state aid to finance research into more efficient means of dairy production. In addition, as the Petitioners argued below, the Commissioner could have simply raised the price that dealers pay for Class I milk to in-state farmers. *Baldwin* does not prohibit any of these activities.

[27] As previously discussed, such subsidy programs are presumed to be valid because Massachusetts would be using Massachusetts funds derived from Massachusetts residents to serve citizens of the state. *See supra* notes 25-26 and accompanying text. In addition, such a subsidy scheme, unlike the Pricing Order, would afford Massachusetts legislators and voters a direct say in whether to support a particular state industry with state tax dollars.

Neither the Commissioner nor the Massachusetts court, however, considered the availability of any less restrictive alternatives to the Pricing Order. Massachusetts simply cannot require out-of-state dairy farmers, and the milk dealers who purchase milk from them, to provide economic assistance to Massachusetts dairy farmers when perfectly legitimate constitutional alternatives, that do not burden out-of-state producers or interstate commerce, exist.

CONCLUSION

For the aforementioned reasons, the decision of the Massachusetts Supreme Judicial Court should be reversed.

Respectfully submitted,

MICHAEL L. ALTMAN
Counsel of Record
MARGARET A. ROBBINS
RUBIN AND RUDMAN
50 Rowes Wharf
Boston, Massachusetts 02110
(617) 330-7000

Counsel for Petitioners

DATED: November 15, 1993